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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 RETIREMENT BOARD OF THE
5 POLICEMEN'S ANNUITY AND
6 BENEFIT FUND OF THE CITY OF
7 CHICAGO, on Behalf of Itself
8 and Similarly Situated
9 Certificate Holders,

10 Plaintiffs,

11 v.

12 11 CV 5459 (WHP)

13 THE BANK OF NEW YORK MELLON
14 (as Trustee Under Various
15 Pooling and Servicing
16 Agreements),

17 Defendants.

18 -----x
19 Before:

20 HON. WILLIAM H. PAULEY III,

21 District Judge

22 APPEARANCES

23 SCOTT & SCOTT LLP
24 Attorneys for Plaintiffs
25 BY: WILLIAM C. FREDERICKS
BETH ANN KASWAN

MAYER BROWN LLP
Attorneys for Defendants
BY: MATTHEW D. INGBER
PAULA GARRETT LIN
LISA R. PLUSH

New York, N.Y.
September 3, 2014
12:20 p.m.

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1 THE DEPUTY CLERK: Matter on for a status conference
2 of Retirement Board of the Policemen's Annuity And Benefit Fund
3 of the City of Chicago versus the Bank of New York Mellon.

4 Will counsel for the plaintiffs please state your
5 appearances.

6 MR. FREDERICKS: William Fredericks, Scott & Scott
7 Attorneys At Law LLP, for plaintiffs.

8 MS. KASWAN: Beth Kaswan, also with Scott & Scott, for
9 plaintiffs.

10 THE DEPUTY CLERK: Counsel for the defendants?

11 MS. LIN: Good afternoon, your Honor. Paula Lin with
12 Mayer Brown on behalf of the defendant.

13 MR. INGER: Good afternoon. Matthew Ingber from Mayer
14 Brown for Bank of New York Mellon.

15 MS. PLUSH: Good afternoon. Lisa Plush from Mayer
16 Brown on behalf of the Bank of New York Mellon.

17 THE COURT: All right. I set this matter down for a
18 conference following my resolution of a sampling of issues
19 related to the defendant's assertion of privilege on certain
20 documents. I want to take everyone's temperature and find out
21 where we're headed from here.

22 So who wishes to be heard? Mr. Fredericks, Ms. Kaswan
23 why don't you lead off.

24 MR. FREDERICKS: I'll lead off, your Honor.

25 With respect to the privilege document review, we

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1 received from defendants the additional documents that the
2 Court ordered to be produced on August 28th, and I believe also
3 some additional documents which I think we considered as being
4 identical copies of documents that the Court ordered produced.

5 We have made an initial review of those materials. We
6 forwarded to defendants on Friday afternoon, the day after we
7 received the additional document production, a list of
8 additional documents which, based on our initial review of
9 document descriptions and recipients and senders, we thought
10 would plausibly also not be privileged, and requested that
11 defendants rereview those documents in light of the Court's
12 order for possible production as may be appropriate.

13 Obviously, it's been a long Labor Day weekend we
14 haven't received a response to that letter, but it would be our
15 expectation that we would receive a response in not too long a
16 time and it would be our hope to try to work through the
17 meet-and-confer process to try to resolve any outstanding
18 issues and so we would suggest that that process be allowed to
19 go forward before seeking any further intervention of the
20 Court.

21 I think for the record, our letter identified
22 approximately 50 additional documents that we thought should be
23 produced. So I think that in light of those circumstances,
24 that the course of action that I suggest we hope will be
25 agreeable to the Court and to the defendants.

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1 THE COURT: Ms. Lin.

2 MS. LIN: Your Honor, we agree with the plaintiffs'
3 proposal and we will respond to their letter.

4 I would just add to that, just so that everyone is
5 clear, that we have been reviewing -- we have done an
6 additional review of our original privilege log since the
7 Court's February order regarding in camera review and we have
8 been assessing our original privilege calls and making
9 productions of additional material off of the logs since that
10 order came down and in addition to that, we are taking your
11 Honor's August 18th order and we are looking at our privileged
12 log more generally we are certainly going to look at the
13 documents that the plaintiffs have identified to us but we are
14 going to look at the privilege log as a whole and where there
15 are similar -- where your privilege determinations have value
16 to other documents on the log we will apply those
17 determinations?

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19 THE COURT: Well, obviously I think that's a very
20 efficient and effective way to proceed. My first question is:
21 How much time do you think you need to complete that process?
22 Let's see if we can tie off the issues related to the privilege
23 log and move on to other matters like expert discovery and
24 class assertification?

25 MS. LIN: Your Honor, I think we would need one month

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1 to do everything, that is, both respond to the documents raised
2 in the letter and also go through the log more generally and
3 identify anything else that should be produced.

4 MR. FREDERICKS: That sounds like a reasonable goal
5 for the parties to aspire to. Past history sometimes suggests
6 that it takes a little longer, but I think in terms of order of
7 magnitude, a month, four to eight weeks is probably the right
8 order of magnitude.

9 THE COURT: All right. Why don't we be Solomonic then
10 and say October 17th. We'll see if we can complete that
11 process now.

12 What are the parties' views in terms of moving forward
13 with the litigation in this case, recognizing that there is
14 still an interlocutory appeal that's pending?

15 MR. FREDERICKS: I'll go first with plaintiffs' views.
16 There are a handful of additional cleanup discovery
17 matters dating back to the winter of this year which we think
18 may require the Court's attention. Many issues we have
19 reviewed but, again, in terms of cleanup I want to identify the
20 salient ones for the Court.

21 First of all, I believe in docketed entry number 168
22 we submitted a joint letter with defendants requesting the
23 production of certain additional categories of documents that
24 were the subject of a November 27th, 2013, discovery request --

25 THE COURT: You said docket number what?

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1 MR. FREDERICKS: Docket 168, your Honor.

2 THE COURT: The docket --

3 MR. FREDERICKS: I'm sorry, it's 138.

4 THE COURT: Good, OK.

5 MR. FREDERICKS: My mistake, your Honor.

6 The Court denied that request without prejudice to its
7 being renewed following the Court's ruling on the claim for
8 breach of covenant of good faith and fair dealing. We have
9 gone back, reviewed, of course, the Court's order, we've gone
10 back and reviewed the documents that we requested. And we
11 believe that there are still approximately a half dozen
12 categories of documents from our November document requests
13 which will remain relevant, which are relevant, have been
14 relevant in the case for some time. And the parties had been
15 involved in a meet-and-confer process with respect to a number
16 of those requests, but those discussions ultimately were
17 preempted by the joint letter process.

18 So that issue -- there are still some issues that are
19 live there, and we would be happy to pursue with defendants
20 those additional requests which we still believe are salient.
21 If we can't resolve our dispute, we may need to tee that issue
22 up again.

23 The parties had also agreed amongst themselves not to
24 submit a joint letter to your Honor in February of 2014
25 regarding plaintiffs' efforts to take the deposition of Robert

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1 bailee, who was an in-house counsel at Bank of New York Mellon.
2 The parties mutually agreed it would be premature to tee that
3 issue up until the Court had finished its review of privileged
4 documents. The defendants had submitted to us a form of
5 proposed affidavit attesting to their view, apparently
6 Mr. Bailey's view that his role was limited to attorney-client
7 advising, that he didn't have any business role.

8 I believe that that affidavit, for example, was never
9 signed because we never actually filed the joint letter, but I
10 think that to preserve the record and to make clear that there
11 was no waiver on plaintiffs' part of our efforts to depose
12 Mr. Bailey, we will likely have to tee that issue up again and
13 just make an appropriate record, with appropriate supporting
14 affidavits from defendants attesting to their position.
15 Obviously we don't want to have a situation at trial where Bank
16 of New York comes forward and says, oh, we want to put
17 Mr. Bailey on the stand to testify as to certain subjects when
18 they had told us in prior conversations that it would be
19 inappropriate to have him deposed because of his purportedly
20 exclusive legal role.

21 So I think that those are the cleanup matters from the
22 winter. Obviously with respect to the Second Circuit opinion,
23 the standing issue, we're all waiting for the Second Circuit.
24 And depending on how the Court rules, there may be a need to
25 reopen discovery as to a number of points, most obviously

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1 discovery relating to Bank of New York Mellon's treatment of
2 trusts other than the trusts in which this Court has previously
3 found we have standing.

4 To the extent that the final size of the class and
5 therefore issues relating to damages, for example, or certain
6 damages like damages, remain in determina, it would seem
7 inefficient and expensive and time-consuming to proceed either
8 to resolution of class certification or related expert
9 discovery issues until the Court -- I was going to say upstairs
10 but I guess across the street in Foley square has issued its
11 decision. I would just alert the Court at least as I'm aware
12 that the Second Circuit appeal issues on both the TIA issues
13 and the standing issues were fully briefed and were argued in
14 May. I don't care to speculate what the timetable of the
15 Second Circuit's decision is but I don't think that we're
16 talking about an inordinate delay and we're all waiting with
17 interest to see what the Second Circuit does.

18 So I think that would be our status report on some
19 cleanup items as well as our perspective on what in sum would
20 be a stay of class certification and expert discovery until we
21 get some additional guidance as to the scope of the case and
22 the claims that are in or out of the case from the Second
23 Circuit.

24 THE COURT: Would these cleanup items in any way be
25 affected by whatever the Second Circuit does?

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1 MR. FREDERICKS: No, your Honor -- I don't think so.
2 It's conceivable in some respects, but the cleanup document
3 discovery relates primarily to our request for information,
4 documents in Bank of New York Mellon's possession relating to
5 country wide's financial condition and possible knowledge of
6 fraudulent conveyances, preferential transfers or alleged
7 fraudulent conveyances preferential transfers.

8 I would just note that after, defendants would
9 contend, that document discovery closed we receive a copy of a
10 letter -- it's previously been brought to the Court's
11 attention -- a letter from the Aurelius investment firm
12 directed to Bank of New York Mellon, basically expressing its
13 concern that Countrywide was insolvent, and indeed deeply so,
14 that the Countrywide transactions with Bank of America in July
15 and thereafter in 2008 were being structured in a way to strip
16 out assets from Countrywide, which, it's our position, would
17 have left Countrywide with far fewer assets available to pay a
18 judgment than if Bank of New York acted prudently, had acted to
19 conserve the assets of Countrywide.

20 It has been Bank of New York Mellon's consistent
21 position, both in this court and then across the street in
22 front of Judge Kapnick that the primary reason they entered
23 into a later settlement for \$8-1/2 billion no one could have
24 obtained any more money because of Countrywide's limited
25 ability to pay. Our contention is, had they acted in the

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1 middle of 2008, when Countrywide still had tens of billions of
2 assets, I believe Countrywide home loans alone had over
3 \$55 billion in assets that there would have been a substantial
4 greater pool to collect a judgment from.

5 So I believe that, regardless of how the Second
6 Circuit comes down on the TIA or standing issues, those issues
7 are still in the case, both with respect to our theory of
8 damages and as a response to what we anticipate to be a likely
9 defense to liability and/or damages that will be offered by
10 Bank of New York Mellon saying, oh, what could we have done,
11 there was no money in the piggy bank.

12 So those documents are important. And, again, I
13 mention to your Honor we're aware of this Aurelius letter which
14 was sent specifically to Bank of New York Mellon and carbon
15 copied to Bank of New York Mellon's outside counsel. We got a
16 copy of this letter. We only know about it because we
17 subpoenaed their outside counsel at Carter Ledyard but we have
18 been locked in our efforts, actually, for example, to find out
19 who at Bank of New York Mellon got copies of this letter, who
20 got copies of other correspondence from Countrywide investors
21 raising concerns about Countrywide's financial conditions.
22 Unfortunately our 30(b)(6) deponent from cart lettered had no
23 recollection of the Aurelius letter so we had no idea at who
24 Bank of New York Mellon may have gotten this or similar
25 correspondence or what conversations may have been had so

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1 that's perhaps an overlong way of saying that our document
2 requests relating to the structuring of the 2008 transactions
3 between Countrywide and B of A and documents relating to
4 Countrywide's solvency Bank of New York Mellon's knowledge
5 thereof, fall within a category of documents which we think is
6 still going to be relevant regardless of how the Second Circuit
7 rules.

8 THE COURT: All right.

9 Who from the defendants? Mr. Inger?

10 MR. INGER: Yes. Good afternoon, your Honor.

11 We are in agreement with the plaintiffs object some of
12 what they said, that is, with respect to the procedural issues.
13 We think it makes sense to have a meet-and-confer about the
14 cleanup discovery issues. We thought that after your Honor
15 dismissed the implied covenant claim these outstanding document
16 requests would no longer be the subject of a meet-and-confer
17 because we thought the underlying documents related
18 specifically to that claim, but we're happy to have a
19 meet-and-confer object that topic and then raise the issue with
20 your Honor if necessary.

21 With respect to the deposition of Mr. Bailey, we have
22 told the plaintiffs what our position is, that all of his
23 documents would be privileged and it's unnecessary and a waste
24 of everyone's time to take the deposition just so that we can
25 assert the privilege over virtually every question again,

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1 though, that's something we're happy to meet and confer about.

2 With respect to how we proceed from here, in light of
3 the pending Second Circuit appeal, we agree that it would be
4 inefficient to proceed with class cert discovery. Class cert
5 expert discovery, and merits expert discovery, in light of both
6 the standing issues and the TIA issues we're certainly hopeful
7 that we are going to get a decision from the Second Circuit
8 shortly I can't predict when we're going to get the decision
9 but I hope it will be sometime soon, given that it was argued
10 back in May. And in the meantime it sounds like there is some
11 work for us to do we're going to be going through the
12 privileged documents and making any production that we think is
13 appropriate under the circumstances in light of your Honor's
14 order. We'll have a meet-and-confer about the Bailey deception
15 and these additional categories of documents. They clearly
16 believe that these issues are still at play. I'm pretty
17 certain our position will be that they're not but we will have
18 a discussion about that.

19 So I think we could use our time productively and then
20 perhaps we could set a date if we don't have a decision, to
21 come back and determine how to proceed but with respect to
22 damages and class cert, we find it challenging to say the least
23 to proceed with discovery on those issues when we don't know,
24 for example, how many trusts are at issue.

25 THE COURT: All right. It sounds like we're all in

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1 agreement regarding class cert and expert discovery. So for
2 the time being, I won't fix, even attempt to fix any schedules
3 there.

4 It strikes me that the parties not only could continue
5 to meet and confer regarding the privilege issues that we have
6 discussed but also the cleanup discovery. And if you cannot
7 resolve those matters, it strikes me that -- what about
8 submitting either a status report or presenting the issues to
9 me in a joint letter by October 17? Is that going to be
10 sufficient time to tie off these various matters including the
11 Bailey deposition?

12 MR. INGER: I think so, your Honor.

13 MR. FREDERICKS: Plaintiffs agree.

14 THE COURT: All right. So by October 17 you will
15 give me a letter that will report on those matters that have
16 been resolved through meet-and-confers and hopefully that will
17 be the bulk of the letter, if not all of the letter, and you'll
18 also present to me any disputes, discovery disputes, that you
19 wish to have resolved.

20 Just perhaps so we stay on track, I think that we
21 should have a further conference in early November, let's say
22 November 7th.

23 MR. INGER: What day of the week is that, your Honor?

24 THE COURT: That's a Friday.

25 MR. INGER: I'm supposed to be out of town that

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1 Friday, November 7th I can do it any other day that week.

2 THE COURT: The 6th at 4:30, November 6th at 4:30.

3 And if the trial I have that week is folding, I'll try to get
4 you here a little earlier in the afternoon.

5 Is there anything else that we can accomplish this
6 afternoon?

7 MR. FREDERICKS: I don't believe that there are any
8 other outstanding discovery "from defendants, so I assume that
9 the schedule is likely to work because I'm not aware of any
10 concerns on the other side.

11 MR. INGER: We've had some back-and-forth, your Honor,
12 over some interrogatories that we're still waiting for a
13 response to from the plaintiffs. I think we could just throw
14 that into the bucket of cleanup discovery items that we will
15 address through the meet-and-confers.

16 THE COURT: Fine.

17 MR. FREDERICKS: Counsel has refreshed my recollection
18 I think that is the one issue.

19 THE COURT: Good so there will be no October
20 surprises, right?

21 MR. INGER: No October surprises.

22 THE COURT: Thanks very much for coming in I didn't
23 mean just enter a brief scheduling order for the conference and
24 the submission to the Court on October 17th.

25 MS. LIN: Thank you, your Honor.

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1 MR. FREDERICKS: Thank you, your Honor.

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